# STATE OF MICHIGAN

# COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIS GREEN,

Defendant-Appellant.

---

UNPUBLISHED
November 13, 2003

No. 241743
Wayne Circuit Court
LC No. 00-007037

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to one year probation for both the carrying a concealed weapon conviction and the felon in possession of a firearm conviction to run concurrently, but consecutive to two years' imprisonment for the felony-firearm conviction. On appeal, defendant argues that double jeopardy precludes his conviction for both felony-firearm and felon in possession of a firearm. He also argues that he was denied the effective assistance of counsel at trial, that the trial court never accepted the jury verdict on the record, and that the totality of errors denied defendant a fair trial. Because the record does not support defendant's challenges, we affirm his convictions and sentences.

Defendant first argues that this Court should dismiss his felony-firearm conviction because his felon in possession of a firearm conviction cannot be used as the predicate felony for felony-firearm because the elements of the crimes are the same and thus violate double jeopardy. We disagree. This Court considered and rejected the same argument in *People v Dillard*, 246 Mich App 163, 167-171; 631 NW2d 755 (2001), which decision is binding precedent on this Court. MCR 7.215(I)(1). The *Dillard* Court held that convictions for felon in possession of a firearm and felony-firearm do not violate the Double Jeopardy Clauses of the United States and Michigan Constitutions. *Dillard* also explained that felon in possession of a firearm is not one of the statutorily enumerated offenses for which a felony-firearm conviction cannot be obtained, and that the two statutes have distinct purposes addressing different social norms, thus permitting multiple punishments. *Id*. at 167, 171.

Defendant next argues that he was denied the effective assistance of counsel at trial and therefore his convictions should be reversed and a new trial granted. After defendant was convicted, he filed a motion for a new trial or for a *Ginther*[1] hearing, on the grounds that he received ineffective assistance of counsel. After the *Ginther* hearing, the trial court denied defendant's motion for a new trial. Defendant raises several arguments on appeal to support his contention that he was denied the effective assistance of counsel at trial. We disagree. Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and its determinations of law de novo. *Id*.

Effective assistance of counsel is presumed and a defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In order to demonstrate that counsel's performance was constitutionally defective, a defendant must also overcome the strong presumption that his counsel's action or inaction was sound trial strategy. *Id*. at 600.

First, defendant maintains that his trial counsel was ineffective because she agreed to allow the prosecution to admit into the trial record defendant's previous conviction for carrying a concealed weapon that buttressed his current felon in possession charge. Defendant states that instead, consistent with *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), his trial counsel should have been aware of the prejudicial effect of the jury being informed that defendant was previously convicted of the same offense. Defendant asserts that his trial counsel should have offered to stipulate that the jury be informed that defendant had been convicted of a previous unspecified felony rather than agreeing that defendant had been convicted of carrying a concealed weapon.

At the *Ginther* hearing, defense counsel stated that she had considered the possibility of offering to stipulate that defendant had been convicted of a prior unspecified felony as opposed to having the jury learn that the previous felony conviction was for carrying a concealed weapon as well. Defense counsel explained that at the time she decided leaving the jury to speculate regarding the substance of the previous felony would be more damaging. Counsel stated that she believed that the jury might think the previous felony was a violent offense or a drug offense and decided that disclosing the nature of the previous felony would be less damaging. At the *Ginther* hearing, in hindsight, counsel admitted that "it was probably not a good decision." The trial court found that defense counsel's strategy was not unreasonable, was "extremely valid" and noted that if defense counsel's strategy had worked "we wouldn't be here."

We agree with the trial court. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

NW2d 715 (1996). We find defense counsel's decision is one of strategy and do not find it constitutionally defective in this regard. *Carbin, supra,* 463 Mich 599-600.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to call "key defense witnesses." The trial court declined to hold an evidentiary hearing on this issue stating that the decision to call witnesses known to the defense is clearly trial strategy. The trial court also pointed out that it had no doubt that the decision was a strategic one since one of the witnesses appeared but was not called. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra,* 237 Mich App 76. After reviewing the record, we agree with the trial court that defense counsel's decision was one of trial strategy and we will not assess counsel's competence with the benefit of hindsight. Defendant was not denied the effective assistance of counsel at trial.

Defendant next argues that he is entitled to a new trial because the trial court never accepted the jury verdict on the record. Defendant cites MCL 763.2, as well as two cases, *People v Simon*, 324 Mich 450; 36 NW2d 734 (1949) and *People v Little*, 305 Mich 482; 9 NW2d 683 (1943) for the proposition that he cannot be convicted of the charged offenses because the verdict of the jury was not properly accepted and recorded by the court. Citing *Little, Simon* states as follows, "[t]he verdict of the jury was taken by the court clerk in the absence of the trial judge and was, for that reason, void, entitling defendant to a new trial." *Simon, supra,* at 457. MCL 763.2 states,

> No person charged with an offense shall be convicted thereof unless by confession of his guilt in open court or by admitting the truth of the charge against him or after trial by the court or by the verdict of a jury accepted and recorded by the court.

Here, a review of the record reveals that the trial judge was present when the jury rendered its verdict and the jurors were individually polled. The trial court then thanked the members of the jury for their service and discharged the jury. In the absence of the jury, the trial judge immediately scheduled a date for sentencing. The verdict here was received by the judge and not the clerk of the court. We find that the actions of the trial court illustrate its proper acceptance of the verdict pursuant to MCL 763.2. Simply because the trial court did not explicitly declare "the verdict is accepted" is not error.

Finally, defendant asserts that the cumulative effect of the totality of errors at trial necessitates reversal and a new trial. Because we have found no error on our review of the record, we disagree, and affirm defendant's convictions and sentences.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio